TAN AH THEAM & ORS

v.

ONG HAN MENG

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-226-1996]
29 JUNE 2000

CONTRACT: *Repudiation - Acceptance - Contracts Act 1950, s. 74 - Whether respondent rejected the agreement - Whether the appellant's counterclaim valid*

The respondent agreed to purchase a piece of land from the appellants. Pursuant to cl. 4 of the sale and purchase agreement ("the agreement"), the respondent was entitled to submit a layout and building plan for the construction of buildings on the said land, while the appellant shall sign all the plans and application pertaining to the development of the land. Accordingly, the respondent submitted the layout plan but it was rejected by the local authority on the ground that the measurement used in the plan was not in metric system. The respondent then re-submitted exactly the same plan except for the measurement used. The appellants refused to sign the second plan. As the respondent could not develop the land, he sued the appellants for loss and damages for wrongful repudiation. The appellants however counterclaimed that it was the respondent who had wrongfully repudiated the agreement. The issues before the trial court were (i) whether the appellants had sufficient cause to refuse the execution of the building plans; and (ii) whether the appellants had lawfully rescinded the agreement.

Held:
Per Abdul Malek Ahmad JCA

[1] This court was in agreement with the findings of the trial judge that the "grouse" of the appellants that the signatures on the second plan were not theirs was not a good and valid defence to the action nor a sufficient basis for counterclaim, as the respondent had not rejected, disclaimed or renounced the agreement.

[Appeal dismissed with costs.]

[Bahasa Malaysia Translation of Headnotes]

Responden bersetuju untuk membeli sebidang tanah dari perayu-perayu. Selaras dengan klausa 4 perjanjian jualbeli ("perjanjian tersebut"), responden berhak untuk menyerahkan plan bangunan dan susunatur bagi bangunan yang akan dibina di atas tanah tersebut, manakala perayu-perayu akan menandatangani kesemua plan dan permohonan yang berkaitan dengan pembangunan tanah tersebut. Responden kemudiannya menyerahkan plan susunatur tetapi plan tersebut ditolak oleh pihak berkuasa tempatan kerana ukuran yang digunakan di dalam plan bukan dalam sistem metrik. Responden kemudian menyerahkan semula plan yang sama cuma ukurannya dalam sistem metrik. Perayu-perayu enggan menandatangani plan kedua tersebut. Olehkerana responden tidak dapat membangunkan tanah tersebut, beliau menuntut kerugian dan gantirugi dari perayu-perayu kerana penolakan salah. Perayu-perayu sebaliknya membuat tuntutan balas, bahawa responden telah menolak secara salah perjanjian tersebut. Isu-isu dihadapan mahkamah bicara adalah; (i) samada perayu-perayu mempunyai sebab yang mencukupi untuk tidak menyempurnakan plan bangunan tersebut; dan (ii) samada perayu-perayu secara sah telah membatalkan perjanjian tersebut.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Mahkamah ini bersetuju dengan keputusan hakim bicara bahawa "sungutan" perayu-perayu yang tandatangan-tandatangan pada plan kedua itu bukan tandatangan mereka bukanlah satu pembelaan yang baik dan sah untuk tindakan ini ataupun memadai sebagai asas untuk tuntutan balas memandangkan responden tidak menolak, menafikan atau melepaskan perjanjian tersebut.

[Rayuan ditolak dengan kos.]

Legislation referred to:
Contracts Act 1950, s. 74

For the appellants - Karen Yeoh Su-Li; M/s M David Morais
For the respondent - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-13-1988 (Mt. 2)]

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Malek Ahmad JCA:

According to the statement of claim of the respondent, who was the plaintiff in the court below, by a sale and purchase agreement dated 21 January 1986 between him as purchaser and the six defendants, who are the appellants before us, as vendor, the respondent had agreed to purchase a portion of Lot 391, Section A, Town of Jelutong, Penang with the premises No. 260 Jalan Jelutong at a price of RM210,000 subject to the terms and conditions contained in the agreement.

Clause 4 of the agreement states that the respondent is entitled to submit layout and building plans for the construction of three units of four storeyed shophouses on the land, and the appellants shall sign all plans and applications pertaining to the development of the said land.

Clause 9 of the agreement provides that if the respondent's application in clause 4 is not approved within thirty months from the date of the agreement, then the appellants are entitled to rescind the agreement whereupon they are to refund the RM15,000 deposited by the respondent.

Accordingly, the respondent had submitted a layout plan and the building plans to the Majlis Perbandaran Pulau Pinang (hereinafter "the MPPP") signed by all the appellants. The layout plan was approved on 25 May 1987. However, the building plans were rejected on the grounds that they had used the imperial system instead of the metric system.

Another set of building plans were subsequently prepared and a temporary staff member of the firm of chartered architects responsible (PW2) signed them for and on behalf of the appellants on the instructions of the third appellant. The said plans were submitted to the MPPP on 2 July 1987.

Through their solicitors, the appellants wrote a letter on 11 August 1987 to the MPPP alleging that the respondent had submitted the building plans despite not being signed by them and accordingly, they requested the MPPP not to consider them for approval as they intended to institute proceedings against the parties responsible for the alleged fraudulent deception.

It was the respondent's averment that the appellants have not suffered or will not suffer any loss whatsoever as a result of this as the building plans not signed by them was the same in all material aspects with the earlier ones signed by them except for the metric system replacing the imperial system. In any case, the respondent's solicitors wrote to the appellants' solicitors on 20 August 1987 requesting them to re-sign the amended building plans.

By letter dated 25 August 1987, the appellants refused to do so. The respondent repeated his request on 7 January 1988 and again the appellants refused. Since the appellants had evinced an intention to be no longer bound by the agreement, the respondent took it as a repudiation on the appellants' part. Thus the respondent accepted the repudiation without prejudice to his legal rights to claim damages for breach of contract.

The particulars of the respondent's loss and damage was that he was not able to develop the said land in accordance with the approval layout plan and the proposed building plans within the times stipulated in the said agreement. The estimated loss of profits was in the region of RM617,000.

His claim, therefore, was for a declaration that the agreement had been wrongfully repudiated by the appellants, a refund of RM15,000 paid together with interest, damages for breach of contract amounting to RM617,000 interest, costs and other relief.

Before us, learned counsel for the appellants argued that when the appellants refused to re-sign the building plans for approval, the respondent treated it as a repudiation which they accept. However, it was the appellants' contention that it was the respondent who had repudiated first by the fact of the forgery. Further, the learned judge at first instance did not make any finding that it was the appellants who had terminated the contract and in fact, they had not sent any specific letter of termination. It was also the view of learned counsel for the appellants that the respondent was only entitled to the return of the deposit and was not entitled to damages for loss of profit as he had not sued for specific performance.

It was evidently clear, according to learned counsel for the respondent, from their letters dated 20 August 1987 and 7 January 1988, that his client had wanted the contract to continue and that the second set of building plans submitted for approval which was signed by PW2 were done without his knowledge and approval as a result of which they had prepared the building plans again for the appellants to re-sign. It has been stated in the second letter that should the appellants refuse to re-sign, it would be regarded as a repudiation on their part.

Reference was made to s. 74 of the Contracts Act 1950 which provides that when a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damages caused to him thereby, which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Learned counsel further reiterated that the respondent had paid for the layout plan, the court was not in a position to order the appellants to re-sign the building plans, specific performance was not possible and the prayer for damages was abandoned at the trial as the parties had agreed that damages were to be assessed by the senior assistant registrar.

In their counterclaim, the appellants had asked for a declaration that the said agreement had been wrongfully repudiated by the respondent, a declaration that the sum of RM15,000 had been lawfully forfeited by the appellants, for RM2,250,000 for loss of profits, general damages, interest and costs.

Before the learned High Court Judge, both parties agreed that the only issue was whether the appellants had sufficient cause to refuse the execution of the building plans and whether the respondent, in the face of the appellants' refusal to re-sign the building plans, had lawfully rescinded the said agreement. Regarding the damages, they had agreed that if liability was found against the appellants, they were to be assessed by the learned senior assistant registrar.

Having evaluated the facts presented at the trial, the learned trial judge recapitulated the evidence as follows:

(a) the respondent and his witnesses denied that the respondent instructed PW2, who signed on behalf of the appellants for the second set of buildlng plans submitted for approval, to copy the appellants' signatures;

(b) both PW2 and PW3 testified that the third appellant authorised PW2 to sign on behalf of the appellants;

(c) the third appellant had conceded that he had never alleged that the respondent forged the appellants' signatures or was instrumental for its forgery; and

(d) the respondent instructed PW2 to sign the metric plans for him but did not instruct her to sign on behalf of the appellants.

In a well reasoned judgment, the learned trial judge had concluded in this manner:

> Furthermore, on the facts and circumstances of the instant case, the probabilities favoured the Plaintiff's version, as it would be incredulous that the Plaintiff, with a year still before the Defendants could rescind the agreement and with the Defendants' binding promise to execute the metric plan, would knowingly risk, most unreasonably, where the only advantage or benefit was the saving, most ethereal, of the time that would be taken to secure the Defendants' signatures,

his complicity in a forgery that would expose him not only to criminal prosecution but also the rescission of the said agreement, when there was no financial gain or advantage whatsoever.

Reasonably, the 3rd Defendant, who admitted that there was no difference between the imperial and metric plans, would have appreciated that the metric plan, despite the absence of the Defendants' signatures, did not give to the Plaintiff an advantage that the Defendants had not bargained for in the imperial plan. There being no advantage whatsoever to the Plaintiff, then it was the most unreasonable of teh (sic) Defendants to refuse, even if piqued that their signatures were forged and unhappy with the Plaintiff's explanation, the execution of the fresh metric plan, as it was submitted to them for their signatures within the term allowed for the approval of the building plan and as it was not alleged that the Plaintiff forged or was instrumental in the forgery of their signatures. Therefore, the Defendants' assertion that the Plaintiff had not given them an explanation and that they were denied their right to the execution of the building plan was not supported by the facts. Rather, as contended by learned counsel for the Plaintiff, it was more probable - with the 3rd Defendant's revelation of the existing buildings on the said land - that the Defendants were engineering a way out of the said agreement, as the Plaintiff's erection of the 3 shophouses would take up the existing road access and therefore put paid to Kwong Chin's development of the Defendants' land at the back of the said lot.

As for the other arguments that Mr. Yu raised,

(a) the alleged illegality - the oral authorisation to PW2 to sign the signatures of the Defendants - did not emanate from the Plaintiff,

(b) the oral testimony of PW2 and PW3 was admissible evidence, as it only touched upon the perfomance of the said agreement and was not evidence contradicting varying adding to or subtracting from the terms of the documentary evidence - the said agreement and its terms - prohibited, and subject to the provisos, by section 92 of the Evidence Act,

(c) the amendment of paragraph 11 - the Plaintiff's admission of his knowledge that PW2 copied the signatures of the Defendants - did not put the Defendants to a disadvantage,

(d) the Plaintiff's instruction to PW2 to sign his signature was not the Plaintiff's encouragement to PW2 to copy the Defendants' signature(s), as the Plaintiff's instruction was given after he was informed that the Defendants had instructed PW2 to sign their signatures, and as he was informed that the Defendants had so instructed PW2, there was no reason for the Plaintiff to inform the Defendants that PW2 was copying their signatures,

(e) section 41 of the Contract(s) Act was inapplicable as the absence of the Defendants' signatures on the metric plans was not brought about by the Plaintiff's breach or default, nor by the Plaintiff's action preventing the Defendants' execution; indeed, the false signatures of the Defendants on the metric plan notwithstanding, the further performance of the said

agreement could still be continued, if only for the Defendants' execution of the fresh metric plan(s) that was not made impossible by the Plaintiff.

Recapitulating the 3rd Defendant's testimony - "I have never alleged that the Plaintiff forged the landowner's signatures or was instrumental for its forgery" - and for the grounds herein, the "forgery" complained was not an act or deed of the Plaintiff and not a breach of the said agreement. The Plaintiff, who proved the said agreement and his due performance of the said agreement, and that he had not refused to perform the said agreement or disabled himself from performing his promise in its entirety, was well within his rights to request for the execution of the fresh metric plan(s) - a replica of the imperial plan(s) agreed to before by the Defendants. The "grouse" of the Defendants that the signatures on the metric plan(s) were not theirs, in the instant case, was not a good and valid defence to the action nor a sufficient basis for the counter-claim, as the Plaintiff had not rejected disclaimed or renounced the said agreement.

We, too, have evaluated the evidence presented at the trial, carefully considered the arguments of learned counsel for both sides and the authorities cited by them. As an appellate tribunal, we would be reluctant to interfere with the findings of fact of the court below. However, in this case, we would venture to say that we totally agree with the reasoning and conclusion of the learned trial judge.

Accordingly, we dismissed the appeal with costs and ordered that the deposit is to go to the respondent to account of his taxed costs.